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Comments and Casenotes

Felonious Homicide And The Right Of Survivorship Under Tenancy By The Entireties

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The right of survivorship incidental to a tenancy by the entireties has, at various times, presented legal and equitable problems where one tenant has feloniously taken the life of the other.[1] Inasmuch as England has abolished this estate,[2] these difficulties are peculiarly American.

In theory, the husband and wife who hold by the entireties are each seized of the entire estate as of the day the property was first acquired. Upon the death of either, the other is said to acquire no new property, there merely being a diminution of persons holding the estate, the survivor remaining possessed of the same title originally granted.[3]

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[1] The word "murder" has been purposely omitted. This is because the problem has arisen in cases of voluntary manslaughter as well as first and second degree murder. It is the fact of the felonious homicide in general which the courts have treated, making no distinction as to the particular criminal intent behind the homicide. See, for example, the case of Colton v. Wade, 32 Del. Ch. 122, 80 A. 2d 923 (1951), which dealt with the problem categorically where the husband was killed by the wife's voluntary manslaughter. As to the intent to acquire the property through the death, which necessarily implies premeditation and first degree murder, note Professor Bogert's statement that:

> "The question of the killer's intent in committing his crime should not be important in these cases. It is immaterial whether he killed for the purpose of getting the property of the deceased or from some other motive. He has in fact acquired property as a result of a criminal act, and the inequity and impolity of letting him retain it exist, even though he killed in a moment of anger and at once thereafter committed suicide."

3 BOGERT, TRUSTS AND TRUSTEES (2d ed., 1946), Sec. 478, 57 *et seq.* For the same reason, the word "killer" has been substituted for "murderer", except where the latter is meant in the technical sense.

[2] The Married Women's Property Act of 1882 said that all new conveyances, from the date of its enactment, to husbands and wives created a joint tenancy in the spouses. The Law of Property Act of 1925 (c. 20) converted all prior existing tenancies by the entireties into joint tenancies. 20 Halsbury's Statutes of England (2d. ed., 1950); Real Property (Part I) Sch. I, Part VI, 869.

[3] "Estates by the entireties are creatures of the common law created by legal fiction and based wholly on the common-law doctrine that husband and wife are one, and, therefore, there is but one estate and, in contemplation of law, but one person owning the whole."

4 THOMPSON, REAL PROPERTY (1940), Sec. 1803, 330.

"The interest of one spouse may ripen into a fee simple upon the death of the other, but it is the conveyance to both of them and not the

Applying this concept to the situation in which one tenant kills the other, the courts have held that no new *legal* benefit accrues to the killer as a result of his felonious act, and that the *legal* title remains unaffected. Attempts by personal representatives and heirs of the victim-spouse to have the *legal* title declared vested in them as a result of the homicide, have therefore been futile.

The first case in which such a result was unsuccessfully urged to the courts was *Beddingfield v. Estill & Newman.*[4] An action was brought in equity by the heirs of the victim to have a conveyance by the killer declared void as a cloud on their title, and to declare legal title in them. The Supreme Court of Tennessee dismissed the complaint, and speaking of the killer, said:

> "The title which he claimed was acquired and vested in him by the conveyances made to him and his wife previous to her death, and he did not attempt to convey anything acquired through or under her. Where land is conveyed to husband and wife to hold by entirety, the survivor, upon the death of the other, takes and becomes vested of the entire estate — a fee-simple estate — by virtue of the grant or deed conveying the property to them; the interest of the deceased being terminated by his or her death. This is an ancient, familiar, and well-established doctrine of the common law, and enforced in this and all of the other states of the Union, so far as we are informed."[5]

Without any protracted discussion, the court also ruled that complainant's desired relief violated the Tennessee constitutional provision against forfeiture of property worked by conviction of crime.[6]

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death of either that creates the estate which ripens into the fee simple so that death is not the source of title."

Op. cit., ibid, Sec. 1803, 332. For the same general statement, see 2 TIFFANY, REAL PROPERTY (3rd ed., 1939), Sec. 430, 217 *et seq.* See also Stieff Co. v. Ullrich, 110 Md. 629, 73 A. 874 (1909), where, at page 634, the Court said:

> "There can be no doubt of the proposition that on the date of the recording of the deed the title to the entire property vested in the wife subject to be divested, in the event of her prior death, in favor of her husband. A tenancy by the entireties is in the eye of the law the tenancy of one person, and each is seized of the whole."

The Married Women's Property Act [Md. Code (1951), Art. 45, Secs. 1, 2] in this state has not destroyed the essential character of the tenancy, *i.e.*, each take the entirety and neither a moiety. Marburg v. Cole, 49 Md. 402 (1878); Masterman v. Masterman, 129 Md. 167, 98 A. 537 (1916).

[4] 118 Tenn. 39, 100 S. W. 108 (1907).

[5] *Ibid,* 109 *et seq.*

[6] TENN. CONST., Art. 1, Sec. 12 [1 Tenn. Code Ann. (Off. Ed. 1956) 305].

In *Wenker v. Landon*[7] and *Hamer v. Kinnan*,[8] Oregon and Pennsylvania, respectively, followed the *Beddingfield* principle, and, in actions of ejectment, declared that the legal title was in the killer.[9] The *Wenker* case reiterated, again without discussion, the belief that the extinguishment of the killer's legal title would run counter to a constitutional provision against forfeiture of property worked by conviction.[10]

In 1918, however, a New York lawyer came into equity and asked that a constructive trust be imposed upon the killer's legal estate for the benefit of his wife's heirs. The court, in a *per curiam* opinion, granted the requested relief.[11] From that time on, heirs of a victim-spouse had a convenient weapon with which the killer's right of survivorship could be attacked, but the courts' reaction to the use of the constructive trust device under these circumstances has varied. There are four basic attitudes which the courts have taken toward the problem. Some have denied the trust entirely; some have imposed the trust on half of the property; some have imposed the trust upon the entire property (with or without allowance for the husband's income during his life); and still others have imposed the trust in varying degrees, dependent upon the life expectancies of the killer and the victim.[12] This wide difference of opinion has been brought about by varying answers to the following questions: (1) Can a court, even one of equity, work changes in the rules of property survivorship without the authority of a statute? (2) Does tampering with the common law rights of survivorship in cases such as these violate constitutional or statutory provisions

[7] 161 Ore. 265, 88 P. 2d 971 (1939).

[8] 16 Pa. D & C 395 (1931).

[9] These seem to be the only three cases in which the legal title was assailed.

[10] *Supra*, n. 7, 974. "No conviction shall work corruption of blood or forfeiture of estate." ORE. CONST., Art. 1, Sec. 25 [9 Ore. Comp. Laws Ann. (1940) 139].

[11] Van Alstyne v. Tuffy, 103 Misc. Rep. 455, 169 N. Y. S. 173 (1918). The fact of the constructive trust was a bit obscured by the court's speaking in terms of injunction. But see 4 SCOTT, TRUSTS (2d ed., 1956), Sec. 493.2, 3206.

[12] Professor Scott has classified the cases differently. He does not consider the cases in which the trust was imposed on a life expectancy basis as a separate class, but has made a class distinction between the impression of the trust upon the entire estate with allowance for income to the killer and the imposition of the trust on the entire estate without allowance for income. So, on a different basis, he has also arrived at a four-way classification. SCOTT, *op. cit., ibid*, n. 11, 3204 *et seq.* Professor Pomeroy viewed the problem as simply one of equity imposing a constructive trust upon the property or not, a dichotomy. 4 POMEROY, EQUITY JURISPRUDENCE (5th ed., 1941), Sec. 1054d, 128. See also the recent, though inadequate, annotation in 32 A. L. R. 2d 1099, 1102.

against forfeiture of estate for conviction of crime? (3) Assuming that these first two barriers have been overcome, on what basis can a fair adjustment of the rights of the parties be had?

NO CONSTRUCTIVE TRUST IMPOSED

The Pennsylvania and Indiana courts have refused to apply the constructive trust at all, the latter court reaching its decision in the case of *National City Bank of Evansville v. Bledsoe*[13] just last year. The difficulty occasioned by these courts is that they have declared themselves impotent to reach results based upon public policy, because no initial authority to apply the trust could be found. Referring to the cases in which the courts have aided the heirs of the victim, it was said in the *Bledsoe* case:

> "We are of the opinion that in those cases the courts have, in their zeal to achieve a result, invaded and usurped the functions of the legislative branch of government." . . . [and in the next paragraph] . . . "The question before us involves a matter of public policy."[14]

In *Wyckoff v. Clark*,[15] the killer contracted to convey the property away. When the purchaser refused to perform, the killer brought an action for specific performance, and the defendant answered that the bill should be dismissed and a constructive trust imposed upon the property for the benefit of the victim's heirs. The Pennsylvania court decreed specific performance, dismissing defendant's contentions. In justification of the court's inability to create the trust as an equitable exception to the right of survivorship, the Pennsylvania court cited, as controlling authority, an earlier case which had refused to deny a parricide his

[13] 133 N. E. 2d 887 (Ind., 1956); *dis. op.* 894.

[14] *Ibid*, 892. The case was decided by a 4-2 court, and on p. 895 the dissent eloquently voiced its objection:

> "Without further discussion, I do not believe that our courts should add murder as an approved method of terminating tenancy by entireties in view of the issue presented to the court in this case."

[15] 77 Pa. D & C 249 (1951). This was the first case ever to deny the constructive trust altogether. It was perhaps made easier by the fact that the court knew that it was not creating a binding precedent of any consequence. The spouses had had the property conveyed to them in 1895. In 1941 the Pennsylvania Legislature had passed the Slayer's Act which imposes the constructive trust upon the entire property except for one-half the income for the killer's life. Pa. L. (1941) 816, Sec. 5. Purdon's Pa. Stats. Ann. (1955 Supp.), Tit. 20, Sec. 3445. The court held that the Slayer's Act does not operate retroactively and only applies to conveyances made after the statute's effective date, regardless of when the killing was.

right of inheritance.[16] In addition, the court stated, in one sentence and without authority, that the imposition of the constructive trust violates the constitutional prohibition against forfeiture of property worked by conviction of crime.[17]

Trust Imposed On Half The Estate

The trend of the more recent cases, if any trend can be adduced, appears to be in favor of granting the constructive trust over one-half the property. Four jurisdictions, in five cases decided in the last eight years, have granted this relief. Those states are Missouri, Kentucky, Florida, and Michigan.[18] Unaffected by the argument that even equity should not decide questions of public policy, these courts have applied the equitable doctrine that no wrongdoer should benefit from his wrong, and have found that a substantial benefit does accrue to the tenant by the entireties who feloniously kills his co-tenant. Beginning with the premise that the right of survivorship does not include the right of homicide, it has been said:

> ". . . that merely outliving the wife does not satisfy the conditions imposed by the common law relative to estates by entirety so that the survivor may take all. One must not only be a survivor *in fact* but also a sur-

[16] In Re Carpenter's Estate, 170 Pa. St. 203, 32 A. 637 (1895). The use of this case by the court in the Wyckoff case, *ibid*, 256, was as follows:

> "Counsel for the vendee argues that . . . the court should, under its general equity powers, create a constructive trust to prevent petitioner from obtaining any benefit whatsoever as the result of his crime.
>
> "While this proposal had a supporter in Justice Kephart, . . . the same argument had been rejected by the court in *Carpenter's Estate.*"

The Slayer's Act, *ibid*, also had the effect of avoiding the result of the Carpenter case. See Purdon's Pa. Stats. Ann. (1955 Supp.), Tit. 20, Sec. 3443, which reads:

> "The slayer shall be deemed to have predeceased the decedent as to property which would have passed from the decedent or his estate to the slayer under the statutes of descent and distribution . . ."

[17] Pa. Const., Art. 1, Sec. 19: "No attainder shall work . . . forfeiture of estate to the Commonwealth." Professor Tiffany was apparently in accord with the view that the killer's right of survivorship should remain undisturbed. He said:

> "Where the death of one spouse has been feloniously effected by the other, it seems to be generally held that there is no right of survivorship. It would seem, however, that the right of survivorship would depend upon the fact and not the manner of the other tenant's death."
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> 2 Tiffany, Real Property (3rd ed., 1939), Sec. 430, 219.

[18] The earliest case in which this result was reached was Barnett v. Couey, 224 Mo. App. 913, 27 S. W. 2d 757 (1930). The later cases are: Grose v. Holland, 357 Mo. 874, 211 S. W. 2d 464 (1948); Ashwood v. Patterson, 49 So. 2d 848 (Fla., 1951); Hogan v. Martin, 52 So. 2d 806 (Fla., 1951); Cowan v. Pleasant, 263 S. W. 2d 494 (Ky., 1953); Budwit v. Herr, 339 Mich. 265, 63 N. W. 2d 841 (1954).

> vivor *in contemplation of law.* Indispensible is the prerequisite that the decease must be in the ordinary course of events and subject only to the vicissitudes of life. The killer can assert no right of complete ownership as survivor."[19]

Reasoning from that point with the constructive trust in mind, it is not difficult for the equity court to say that the additional benefits of sole ownership which the killer acquires are benefits unjustly acquired, and that although no new property is acquired, the trust ought to be imposed to prevent the unjust enrichment.[20]

In *Barnett v. Couey* and *Grose v. Holland,*[21] the first two cases to impose the trust over half the property, it was easy for the Missouri courts to arrive at their conclusion. The heirs of the victim only asked for a constructive trust over half the property, and all that was sought was granted. Justifying this result, and in avoidance of the forfeiture of property for conviction of crime problem, the courts, in these cases declared that the felonious homicide, like divorce, terminated the marital status, and like divorce, created a tenancy in common. The constructive trust, therefore, was felt to be proper in being imposed upon only half the estate. The next case to grant this relief was the Florida case of *Ashwood v. Patterson.*[22] Although each of the parties argued for the entire property, the killer had committed suicide immediately after inflicting the death blow, and the facts were such that the court did not know who died first. The court felt that it would therefore be proper to split the property and granted a constructive trust over half, citing and following the approach of the *Barnett* and *Grose* cases. Six months later, though, the Florida court was again faced with the uxorcide problem, and even though the killer was still alive, the court followed the

[19] Barnett v. Couey, *ibid,* 761.

[20] Note for example the following passage from Grose v. Holland, *supra,* n. 18, 466 *et seq.:*

> "When William Edgar Holland murdered his wife he did acquire a practical, substantial benefit by that act. Prior to that murder, both he and his wife were each entitled to enjoy the whole, and each had a chance of survivorship and consequent acquisition of the whole as a tenant in severalty. The practical benefit that he acquired by the death of his wife does satisfy the conditions imposed by the common law relative to estate by entirety so that the survivor may take all. One must not only be a survivor in fact but also a survivor in contemplation of law. Indispensible is the prerequisite that decease must be in the ordinary course of events and subject only to the vicissitudes of life. The killer can assert no right to complete ownership as survivor. Equity will not allow him to profit by his own crime."

[21] *Supra,* n. 18.

[22] *Ibid.*

Ashwood case in a 4 to 2 decision.[23] The concept of the marriage being terminated by the felonious act is an appealing one, and was followed by the two later cases presented with the problem.[24]

The difficulty with the theory, however, is this: if, in fact, the act does dissolve the marital status, then the *legal* title itself would be converted into a tenancy in common, just as it is in the case of divorce.[25] And if the legal title is thus affected, then there is an adequate remedy at law in the heirs of the victim, and the constructive trust, being unnecessary, should be denied on that basis. But, if it is to be said that the marriage is dissolved only in equity and not at law, then the courts which impose this relief are themselves creating a fiction while they profess to be reducing the situation to its actual facts which extinguish the entity basis of the joint ownership.[26]

Trust Imposed Upon Entire Property

Following the New York case of *Van Alstyne v. Tuffy*,[27] the jurisdictions of Massachusetts, New Jersey, and Delaware,[28] have decided that the proper relief is a constructive trust upon the whole of the property. The right of survivorship, though vested in both of the spouses, is viewed by these courts as being subjected to the contingency of *unpredictable* divesture, *i.e.*, unpredictable in the ordinary course of life. Since no one could have forseen who would have been the survivor if the felonious killing had not occurred, the doubt is merely resolved against the wrongdoer. Because it is the killer, himself, who has created this

[23] Hogan v. Martin, *supra*, n. 18.

[24] Cowan v. Pleasant and Budwit v. Herr, *ibid.* The later case affirmed a lower court decision by a split (4-4) court, the dissenting judges taking the view that no trust at all ought to be imposed.

[25] See Reed v. Reed, 109 Md. 690, 72 A. 414 (1909).

[26] As an illustration of how these cases have purported to abandon fiction for reality, see Grose v. Holland, *supra*, n. 18, 466:

> "If two tenants by entirety are divorced, the legal fiction is destroyed and the former husband and wife become tenants in common. . . . If the fiction of complete ownership in each is not destroyed, one or the other must take all the estate."

In Cowan v. Pleasant, *supra*, n. 18, 496, the court recognized that the method by which their result was obtained was not theoretically sound:

> "No useful purpose would be served by attempting to reconcile our conclusion in this case with, or to distinguish it from, the finely spun legalistic theories expressed in the opinions of the courts holding that the heirs of either the wrongdoer, or those of the one murdered, take all of the property when it is held under a tenancy by the entireties."

[27] 103 Misc. Rep. 455, 169 N. Y. S. 173 (1918).

[28] Diamond v. Ganci, 328 Mass. 315, 103 N. E. 2d 716 (1952); Neiman v. Hurff, 11 N. J. 55, 93 A. 2d 345 (1952); Colton v. Wade, 32 Del. Ch. 122, 80 A. 2d 923 (1951).

doubt, these courts feel that it is not too much of an imposition upon him to resolve this against him. The respective life expectancies of the parties are held to be immaterial.[29] The Restatement of Restitution is in accord with their view:

> "The rule . . . is based upon the principle that although the murderer will not be deprived of property to which he would otherwise be entitled, he will not be entitled to profit by the murder; and where it is doubtful whether or not he would have had an interest if he had not committed the murder, the chances are resolved against him. Thus, if the murderer had an interest in property contingent upon his surviving his victim, he is not entitled to keep the property, since although he survives the victim he does so as a result of the murder, and but for the murder he might have predeceased the victim, in which case he would not have been entitled to the property. It is immaterial that because of their respective ages, state of health or the like, it is probable that the murderer would have been the survivor."[30]

No provision was made for any of the income to go to the killer for his life in the *Van Alstyne* case.[31] This is perhaps explainable by the fact that the defendant there did not raise the question of unconstitutional forfeiture. In the later cases, the killers were not so careless, and the constitutional shield was raised. The courts averted the difficulty, however, by saying that if the presumption of the victim

[29] Neiman v. Hurff, *ibid*, 348, exemplifies this feeling:

"Inasmuch as the husband by his wrongful act has prevented the determination in the natural course of events of whether he or his wife would survive, it is not inequitable to presume that the decedent would have survived the wrongdoer. In this situation there is no justification for determining survivorship according to the mathematical life expectancies of the decedent and her murderer. The wrongdoer, having prevented the natural ascertainment of the answer to the question of survivorship, should not be permitted to avail himself of mortality tables which may have no applicability as between him and the decedent in respect to their respective individual possibilities of survivorship. Equity therefore conclusively presumes for the purpose of working out justice that the decedent would have survived the wrongdoer. In no other way can complete justice be done and the criminal prevented from profiting through his crime."

See also Colton v. Wade, *ibid*, 926:

". . . I do not believe the question of life expectancies is material in view of the fact that the survivor's wrongful conduct prevented the natural ascertainment of the surviving tenant. Certainly the doubt should be resolved against the wrongdoer."

[30] RESTATEMENT, RESTITUTION (1937), Sec. 188, Comment a.

[31] See 4 SCOTT, TRUSTS (2d ed., 1956), Sec. 493.2, 3206.

outliving the killer were logically extended, then the killer ought to be entitled to his share of the income from the property as though both spouses were alive. By granting this concession, the later courts felt themselves able to say that nothing which belonged to the killer before the murder was taken from him, and that only that which has been unjustly gained is lost, thereby attempting to answer the argument that this relief constitutes a forfeiture of property worked by conviction of crime.[32]

Although it appears sound at first glance, the proposition that nothing is forfeited by the killer if given a share of the income is not entirely correct. A co-tenant has the right to share possession, and this is taken from the killer by those courts which only grant him a life interest in the profits. Furthermore, even though there is no right of individual alienation in each of the tenants by the entireties, there is the right to join with the other in the conveyance of the property. This, too, is taken from the killer by those courts.

TRUST FLEXIBLY APPLIED

The fourth method of dealing with the constructive trust problem, and the third manner in which the equity courts have tried to prevent the unjust enrichment of the wrongdoer, is to base the relief upon the life expectancies of the parties at the time of the felonious killing. The adherents to this method assume that the probabilities represented by the mortality tables used by courts are what would have

[32] As was said in Colton v. Wade, *supra*, n. 28, 926:

> "My determination to impress a trust does not, realistically, constitute a forfeiture of the defendant's estate because it merely prevents her from obtaining more 'rights in fact' than she had prior to her wrongful act. Until her wrongful act she merely was entitled to share the net income with her husband. The possibility that she would have the exclusive interest by survivorship was just that — a possibility. To resolve against her the doubt concerning this possibility does not work a forfeiture of any estate."

If the killing occurs in a state which allows the husband the full income from property held by the entireties, and the victim is the wife, then the killer is allowed the full income for life. Diamond v. Ganci, *supra*, n. 28, 718:

> "Before the wife's death the defendant had enjoyed a life interest with the exclusive right to rents and profits. This he did not forfeit by the murder."

In such a jurisdiction, if the wife were the killer, the constructive trust would be imposed upon the entire property without the necessity of making any allowance for income. It is for this reason that the writer feels that Professor Scott erred in distinguishing, as a matter of classification, between those cases which make allowance for income and those which do not. 4 SCOTT, TRUSTS (2d ed., 1956), Sec. 493.2, 3204 *et seq.* See also, note 12 of this comment.

actually happened if the killing had not occurred. The trust is applied, therefore, to give the spouse with the shorter life expectancy his (or her) distributive share of the income, and to give the rest to the other. Where the victim has a shorter life expectancy than the killer, the court gives his heirs a constructive trust upon his share of the profits for his normal life expectancy.[33] But where the victim has a longer life expectancy than the killer, his heirs are given a constructive trust upon the entire property, except for the killer's interest in the income.[34]

Professor Bogert is in accord with this method of approaching the problem. He says:

> "Thus, if H and W are tenants by the entirety, H has an expectancy of ten years and W of fifteen years, and H murders W, an equitable result would be that H should be declared a constructive trustee of an estate for ten years in half the property and of the fee in the whole property, subject to an estate for ten years in half of the property in H. Had the murder not occurred, for ten years the profits would have been shared equally, and then, in all probability, W would have acquired the fee in severalty. W's innocent successors should get from H this ten-year interest in half the estate and the fee, subject to an estate for ten years in H in one-half the property. If the murdered, H, had a greater expectation than W, then the constructive trust should extend only to a half interest in the property for the period of W's expectancy at the time of her death."[35]

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[33] Sherman v. Weber, 113 N. J. Eq. 451, 167 A. 517 (1933). The wife was forty and the husband-killer thirty-six at the time of the killing. In achieving its result, the court said:

> "Equity will refuse to permit the husband, or those who claim through him, to profit by the murder and will do justice by restoring the property rights, as nearly as may be, as they were at the time the husband slew his wife, adjudging that because of the act through which the husband became seized of the fee, he was trustee thereof for the interest his wife would have had, had he permitted her to live her normal expectancy of life, and that while the title in fee was vested in the husband and passed under his will to the defendants, they hold it subject to such trust."

The flexible view which this court took was overruled by Neiman v. Hurff, *supra*, n. 28. See the quoted text from that case in n. 29.

[34] Bryant v. Bryant, 193 N. C. 372, 137 S. E. 188, 51 A. L. R. 1100 (1927). In reciting the facts essential to the case, the court said, at page 188 *et seq.*:

> "At the time of the death of said Ida Bryant she was in good health, was younger than her husband, was free from dissipation, while her husband was addicted to the use of strong drink, and under the mortuary table she had a longer expectancy of life than her husband."

[35] 3 BOGERT, TRUSTS AND TRUSTEES (2d ed., 1946), Sec. 478, 57.

Such a position, however, attempts to find certainty in the adjustment of the rights of the parties where none exists. Mortality tables are based upon statistical projection and merely reflect an over-all pattern; they are useless if attempted to be used for individual predictability. No one can forecast another person's being run over by an automobile, and yet these advocates say that they are satisfied that both parties would live their normal life expectancies. What if the victim was younger, with a longer life expectancy, but the killer, in fact, lives far beyond the age at which the mortality tables say he should have died? Or how about the cases in which the killer has committed suicide immediately after the death of the victim? Should the killer who terminated his own life be given the artificial benefit of his life expectancy but for his suicide? The differences in life expectancies which vary with the strain of different employments and social habits are also not factors in an over-all mortality table; but even if they were, those considerations are so subjective as to be unworkable as standards for a court of equity to decide cases upon.[36]

MARYLAND BACKGROUND

No case has been decided by the Court of Appeals on this particular point. One case, however, has indicated the possible result toward which this state may be inclined. In the case of *Price v. Hitaffer*,[37] the Court was presented with the situation in which a husband killed his wife and immediately committed suicide. Both spouses died intestate, and the administrators of their respective estates clashed on the issues of (1) whether, as a matter of public policy, a murdering husband ought to be denied his statutory heirship, and (2) whether the denial of the right of inheritance constitutes a forfeiture of property worked by conviction of crime as prohibited by Article Twenty-seven of the Declaration of Rights. The Court affirmed an Orphan's Court affirmative answer to the first, and negative answer to the second, and denied the killer his right of

[36] In the *Bryant* case, *supra*, n. 34, the court apparently took the subjective factors into consideration. There it was easy because the killer was both intemperate and older. But suppose one spouse is older and the other is socially intemperate? Can the varying degree of age and social habits be added together and considered in one case? Of course not. Yet, if the mortality tables alone are used, the result is purely artificial. The ages of the spouses could be such, that the variation in their life expectancies is a matter of days, and this small difference would decide whether the victim received a life-expectancy interest in the income only or the fee.

[37] 164 Md. 505, 165 A. 470 (1933).

inheritance from the victim, thus also disinheriting all who claimed as heirs through the murderer.

The public policy considerations in the questions of inheritance and survivorship are greatly similar. The denial of either in the case of murder, prevents the unjust enrichment of a wrongdoer. Admittedly, there is a difference in that the former is an acquisition of property, while the latter is merely an acquisition of the additional property *rights* incidental to sole ownership, but in both situations there is the problem of an unjust enrichment resulting from the wrongful act. The Court of Appeals had little difficulty in denying the right of inheritance on this basis:

> "It is impossible to conceive that the maxims of the common law now under consideration, and which we are asked to apply, are inconsistent with or repugnant to the spirit and principles of republican institutions, whose strength lies in the virtue and integrity of the citizen to correct the morals and protect the reputation, rights, and property of individuals, by denying the right of a murderer to enrich himself by taking any part of his victim's estate."[38]

In one respect, it was even a more difficult task to apply the principle of public policy in the *Price* case than it would be in the case of survivorship. The husband's heirship is a right granted by statute and not by common law. Where the very right upon which the wrongdoer bases his claim is a legislature-created one, it should be easier for a court to fall prey to the argument of the *Bledsoe*[39] case that matters of public policy are within the domain of the legislature and not the courts. But, almost as if the very language of the *Bledsoe* case were anticipated, the Court rejected similar holdings in heirship cases, and said:

> "It may be observed, however, that most, if not all, rest upon the argument that courts are powerless to read unambiguous words of the statute in conjunction with universally accepted moral and equitable principles without infringing the domain of legislative action, even though such interpretation result in sanctioning the enrichment of the perpetrator of the most heinous murder from the estate of his victim. Suffice it to say that we decline to follow the reasoning supporting any interpretation fraught with consequences

[38] *Ibid*, 510.
[39] 133 N. E. 2d 887 (Ind., 1956), *dis. op.* 894.

> so pernicious and so abhorrent to the sense of justice, equity, and morality entertained by what we are pleased to believe is the overwhelming majority of thoughtful and moral people, but prefer to give expression and adherence to the principles and reasoning so forcibly presented by those courts who have in the past adopted the views herein expressed."[40]

In support of its position, the Court in the *Price* case cited as "lucid and convincing",[41] the case of *Bryant v. Bryant*,[42] the North Carolina case which imposed a constructive trust upon the whole of the property held in tenancy by the entireties for the benefit of the victim's heirs except for one-half the income, but did so partly on the basis of the wife-victim having a longer life expectancy than her murderer-spouse. Since the *Price* case made no mention of the relative ages of the spouses in the determination of the inheritance problem, however, it would appear that relative life expectancies but for the murder, are immaterial in Maryland, and that the *Bryant* case was approved more for its theory that a constructive trust was proper upon the entire property to prevent the unjust enrichment of a wrongdoer, than its consideration of the ages of the spouses. However, the opinion in the *Price* case should not be considered as being of too much significance as to what a fair determination of the rights of the parties in a survivorship case would be. Most of the cases on the survivorship problem have been decided since the *Price* case, including *all but one* of those which have imposed the constructive trust on half of the property, and the Court in the *Price* case had little survivorship authority from which it could make its choice. More significant than trying to guess what the Court of Appeals will consider an equitable adjustment, is the near certainty that it will consider this principle of public policy preventing the wrongdoer from benefiting from his wrong a binding authority.

The *Price* case was also the only Maryland case to ever construe Article Twenty-seven of the Declaration of Rights, the Maryland forfeiture provision, which reads:

> "That no conviction shall work corruption of blood or forfeiture of estate."

The Court merely held that an heir's expectancy is not a property right and that there was nothing upon which this

[40] *Supra*, n. 37, 516 *et seq.*
[41] *Ibid*, 515.
[42] *Supra*, n. 34.

Constitutional provision could operate. Assuming that the correct view is that it is inevitable that *some* property rights be relinquished by the killer when the constructive trust is imposed in the survivorship cases, does it necessarily follow that Article Twenty-seven is violated? The courts which have ruled on this issue have assumed, without giving thought to the constitution as a public enactment with a purpose, that the answer would be yes. But the brevity of their discussions belie a literal interpretation of the provision. The Court of Appeals in the *Price* case, however, hinted at the true consideration of the problem when it described Article Twenty-seven as, ". . . a constitutional declaration against forfeiture for a general conviction of crime."[43]

At common law, when a man was convicted of any serious crime, the conviction in and of itself worked a forfeiture to the king of all the personalty which the convicted criminal owned.[44] For conviction of treason, a similar result was obtained as to realty and leasehold estates.[45] The theory behind this doctrine was that the right of ownership of property was a social right gained by the individual when he entered into the social contract with the king to form an organized society. Because of his breach of the social contract, the social right itself was lost.[46] Since the basis of the forfeiture was a wrong to the state, it follows that the proof of the wrong to the state was essential. Only conviction can establish the wrong against the state, for that is the function of a criminal prosecution, and so conviction was a necessary element to the forfeiture.[47]

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[43] Price v. Hitaffer, *supra*, n. 37, 508.

[44] 4 BLACKSTONE, COMMENTARIES (Lewis's ed., 1900), 1763 (*386):

"The forfeiture of goods and chattels accrues in every one of the higher kinds of offense: in high treason or misprison thereof, petit treason, felonies of all sorts, whether clergyable or not, . . . standing mute, and the above-mentioned offenses of striking, etc., in Westminster hall."

[45] *Ibid*, 1760 (*381):

"By attainder in high treason a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offense committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist."

[46] *Ibid*, 382.

[47] See Paginton and Huet's case, Godholt 267, 78 Eng. Rep. 156 (1609). See also the statement by Mr. Justice Story:

". . . no right to the goods and chattels of the felon could be acquired by the crown, by the mere commission of the offence; but the right attached only by conviction of the offender. The necessary result was, that in every case where the crown sought to recover such goods and

The technical doctrine of forfeiture of property worked by conviction of crime was part of the early law of Maryland. In 1775, in the case of *Thomas's Lessee v. Hamilton*,[48] the Court of Appeals reversed a refusal by the Provincial Court to apply the doctrine. The case involved an action of ejectment. Plaintiff claimed title through a lease from the Lord Proprietary. Defendant claimed title through an earlier lease from the Lord Proprietary to George Talbot. Upon the assertion of defendant's prior title, plaintiff introduced into evidence the record of conviction of Talbot in Virginia for stabbing a man. The Court of Appeals held that the conviction worked a forfeiture of Talbot's title back to the Lord Proprietary who stood in the same position in the colonies as did the king in the mother country. When Article Twenty-seven of the Declaration of Rights was enacted, this doctrine was in effect and considered a definite evil which the people sought to remedy.

But the imposition of the constructive trust is on an entirely different basis. The theory upon which it is based is that of an individual wrong, independent of the wrong to the state; and the property rights which are lost are relinquished to the estate of the person wronged. Most significant, therefore, is the fact that the criminal conviction in the case of the imposition of the constructive trust is entirely immaterial, and the forfeiture resulting from the constructive trust is not worked by the conviction at all. In the *Van Alstyne*[49] case, the trust was imposed where the murderer committed suicide immediately after the killing and could not have been convicted of the wrong against the state. In New Jersey, the record of the criminal conviction, even if one is obtained, could not be introduced into evidence in a suit to impose the constructive trust, and yet the trust will be imposed if the fact of the killing is established by outside proof of witnesses, confessions, etc.[50]

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chattels, it was indispensable to establish its right, by producing the record of the judgment of conviction. In the contemplation of the common law, the offender's right was not divested, until the conviction." The Palmyra, 12 Wheat. 1, 14 (U. S. 1827).

[48] 1 H. & Mc. 190 (Md., 1755).

[49] Van Alstyne v. Tuffy, 103 Misc. Rep. 455, 169 N. Y. S. 173 (1918).

[50] Sorbello v. Mangino, 108 N. J. Eq. 292, 155 A. 6 (1931), refused to apply any trust where the only proof of the killing was the killer's record of conviction. But see Neiman v. Hurff, 11 N. J. 55, 93 A. 2d 345 (1952), which imposed the full trust where the killing was established by outside proof, and the court there cited the Sorbello case.

CONCLUSION

The idea of the constructive trust being imposed upon the entire property is an appealing one because it satisfies our desire to reap vengeance against the killer. There are, however, mitigating circumstances which can arise, and which would make either this view or its antithesis seem unfair. Suppose, for example, the killer was insane when he took the life of his spouse?[51] Or, suppose the death was brought about by involuntary manslaughter? Or, suppose that the property was originally the killer's and he transferred it to both himself and his wife through a straw man long before he decided to murder her? In all these situations, it would be difficult to give the major part of the property to either spouse.

In none of the cases herein discussed were these or similar mitigating circumstances elaborated upon or employed as factors in the determination of the case. Each of the various jurisdictions dealing with the problem has by strong judicial pronouncement (or by statute) adopted one of the views as its own particular solution, apparently oblivious of the difficulties which may later have to be faced. If the statement of a particular rule is to be taken as governing all future cases, regardless of their facts (or if a statutory rule is adopted), an element of certainty is injected into the law; but, the question arises as to whether this is an area of the law in which predictability should be an influential consideration. It is submitted that the individual equities of a given case should be more important than the blind adoption for all purposes of any one of the aforementioned views, and that the courts of this state should adopt the more realistic approach of the common law process, the case-by-case development of the law, unhampered by the artificial rigidities which any one of the views would require. As each case presents its unique factual difficulties, therefore, the courts should take them into consideration and decide whether all the property should go to either of the spouses, or whether justice could best be served by splitting the property in half. The extent to which the enrichment is unjust, taking into consideration all the mitigating circumstances involved, should be the extent to which the constructive trust device is applied.

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[51] See Recent Decision, Anderson v. Grasberg, 78 N. W. 2d 450 (Minn., 1956), 17 Md. L. Rev. 89, *infra*.